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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 257

HENRY J. JONES,

Petitioner,

against

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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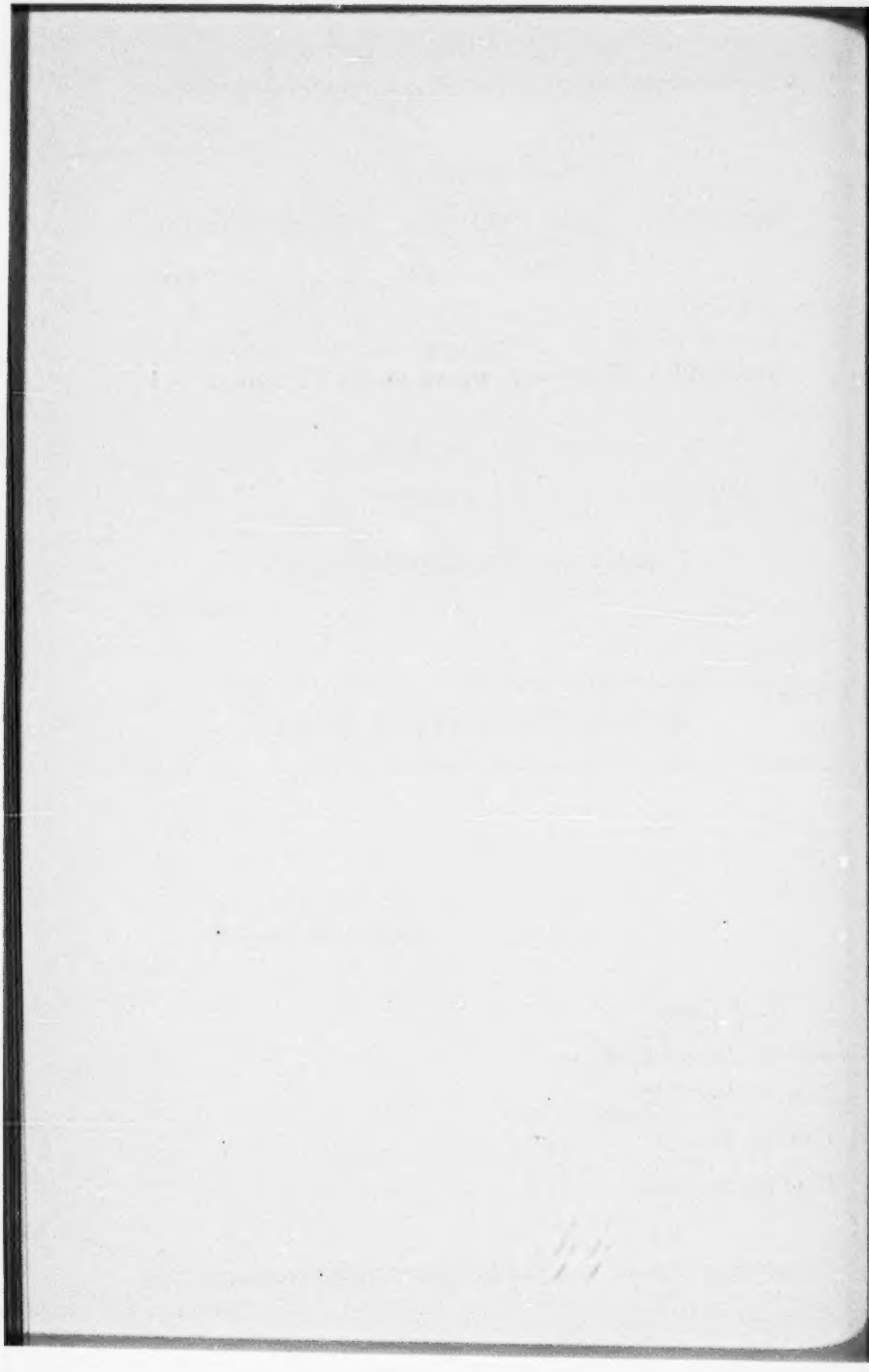

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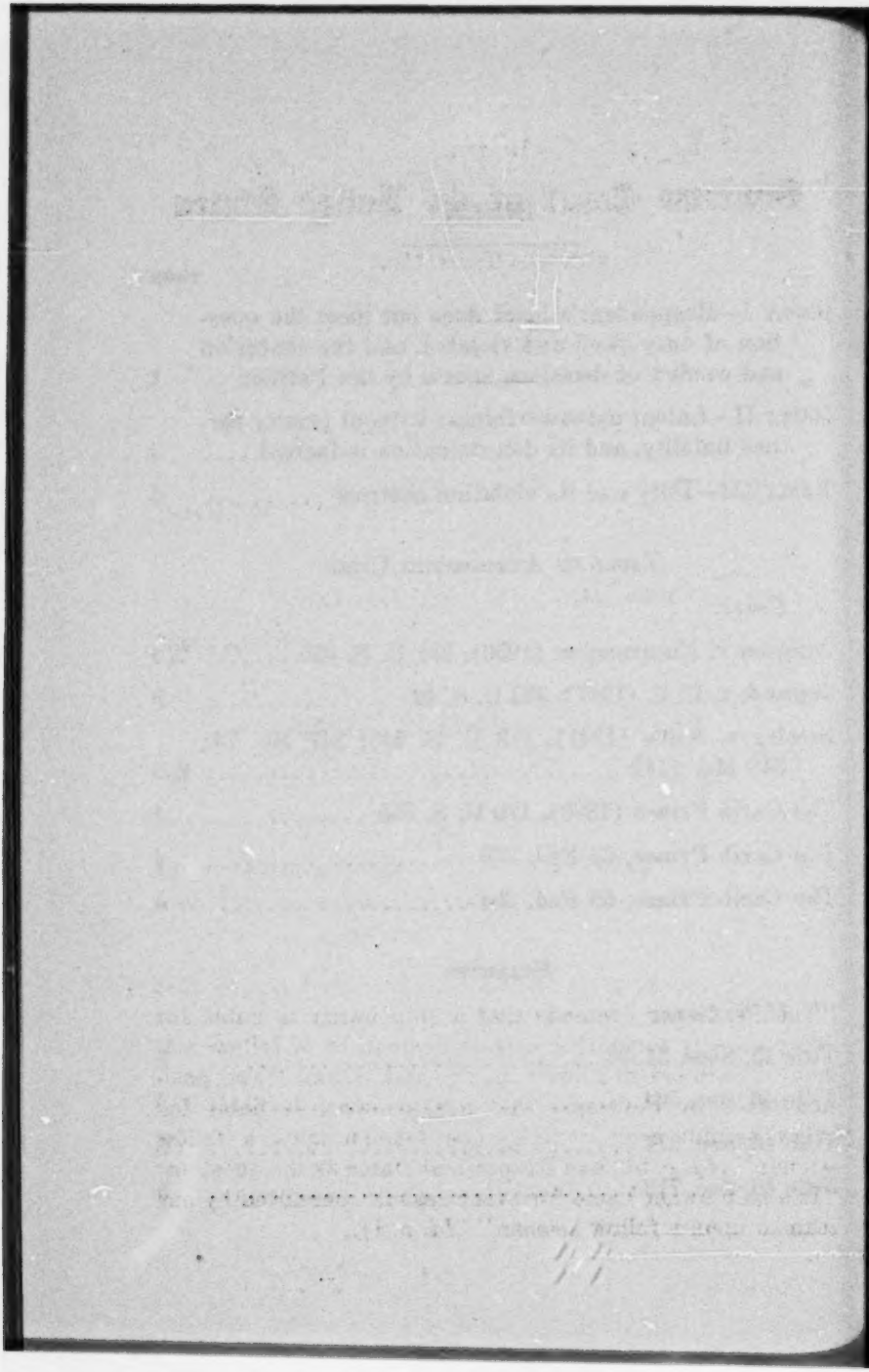

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REPLY I

Respondent's brief does not meet the question of duty owed and violated, and the confusion and conflict of decisions shown by the Petition.

Contrary to the petition, Respondent's brief asserts that "The Petitioner contends that a ship owner is liable for every assault committed upon a seaman by a fellow seaman" (Respondent's brief, p. 2); and, again, "The position taken by Petitioner that a ship owner is liable for every assault committed by one seaman upon a fellow seaman" (*Id.* p. 5); and Respondent states as the question: "Is a ship owner liable for every assault committed by one seaman upon a fellow seaman" (*Id.* p. 1).

But the petition presents no such question and states no such contention or position; and nothing whatever in the petition or the record justifies these misstatements by respondent.

The liability question is whether defendant is liable for or whether plaintiff assumed the risk of an assault on him in the quarters and during the time assigned to him for rest on shipboard, committed without provocation in violation of duty owed by defendant's employee Hunter assigned to the same quarters.

Respondent's effort to represent *Jamison* v. *Encarnacion*, 281 U. S. 635, as establishing that the assault must be by a superior in furtherance of work is directly contrary to this Court's decision in *Steeley* v. *Kurn*, 313 U. S. 545, reversing *Steeley* v. *Kurn*, 347 Mo. 74, 146 S. W. 2d 598. See also *Steeley* v. *Kurn*, 348 Mo. 1142, 157 S. W. 2d 212. Steeley and Murphy were fellow-workmen, handling a 455 pound steel rod, and Murphy "intentionally, deliberately and maliciously" dropped it to injure plaintiff. The Supreme Court of Missouri had ruled:

> " • • • the act of Murphy in 'dropping the rod' • • • conclusively shows that his conduct was malicious. On plaintiff's theory of the facts, it must be ruled that Murphy intentionally, deliberately and maliciously assaulted the plaintiff by 'dropping the rod', thereby seriously injuring him. Furthermore, it must be ruled that said act was not in furtherance of the master's business." (347 Mo. 79)

This Court, nevertheless, reversed and ruled simply:

> "Per Curiam: The petition for writ of certiorari is granted, and the judgment is reversed. *Jamison* v. *Encarnacion*, 281 U. S. 635." (313 U. S. 545)

The Missouri Supreme Court then held:

> "In this situation it must be assumed that said court construed the Jamison case to rule that the word 'negligence', as used in the Federal Employers' Liability Act, includes a deliberate and intentional injury of an employee by another employee of equal station." (348 Mo. 1143)

Here Hunter, as respondent's employee assigned to the same quarters as petitioner, owed and violated duty as positive as Murphy owed and violated in the *Steeley* case.

This was not a "brawl"—it was a vicious unprovoked assault in the quarters and during the time assigned to petitioner for rest on shipboard, committed in violation of the Articles of Agreement and in violation of duty by defendant's employee Hunter assigned to the same quarters as petitioner.

Respondent's brief, it will be noted, does not mention the decisions cited in the petition covering injury of a seaman in the quarters and during the time assigned to him for rest on shipboard, nor a single decision relating to assupmtion of risk and its abolition by the 1939 amendment of the Federal Employers' Liability Act. The reason is obvious: Respondent cannot distinguish them, nor deny their conflict in controlling principle or result with the case at bar.

REPLY II

Latent unseaworthiness without privity carries liability, and its determination is factual.

As to unseaworthiness it has always been held that neither privity nor negligence is required nor their absence material. The single defective rivet in the peak tank in-

volved in *The Carib Prince,* 170 U. S. 655, had occurred in course of construction of the vessel and the later owner's utmost diligence and care could not discover such "latent defect" of the rivet. Yet, with bitters as its cargo, the vessel was held unseaworthy; and the determination of unseaworthiness was held to be a finding of fact. The District Court had said that the evidence "has led me to the conclusion" that the rivet was the cause "and the vessel consequently was unseaworthy in this respect" (*The Carib Prince,* 63 Fed. 266, 267). The Second Circuit Court of Appeals similarly had stated that "consequently, the vessel was not at said times seaworthy" (*The Carib Prince,* 68 Fed. 254, 255). This Court held these determinations of unseaworthiness to be a "conclusion of fact" and consequently a "finding" (170 U. S. 658). Equally here the District Court's determination of unseaworthiness was a "conclusion of fact" (even respondent calls it "conclusions drawn"—Respondent's brief, p. 9) representing a finding, and therefore could not be reversed or even reviewed without having the "evidence" available for "a careful examination of the *evidence*" (170 U. S. 658), under Rule 52.

Respondent's Point II also ignores the facts that petitioner was provided with quarters and that the assault was in the quarters and during the time assigned to plaintiff for rest on shipboard, committed by an employee of defendant assigned to and constituting therefore a part of the quarters assigned to plaintiff. Hunter constituted as much a part of the quarters as any piece of furniture therein. His function and duty, and defendant's duty respecting him or through him were measured accordingly. Any argument against liability amounts at best to a contention that his deficiencies and the consequent deficiencies of the quarters assigned to petitioner were "latent"—as were the deficiencies of the rivet in *The Carib Prince.*

REPLY III

Duty and its violation controls.

Finally, we repeat that the words "negligence of any of the officers, agents *or employees*" includes co-servants of equal rank (45 U. S. C. §§ 51, 54; *Steeley* v. *Kurn*, 313 U. S. 545; *Johnson* v. *U. S.*, 333 U. S. 46, 49). Negligence is a breach of duty (*Jamison* v. *Encarnacion*, 281 U. S. 635, 641). Duty in this instance comprehends the providing of safe quarters, and is stated also in the Articles of Agreement prescribed by Revised Statutes, §§ 4511, 4519; U. S. C. Title 46, §§ 564, 577, which provide that "* * * and the said crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties * * *" (Schedule, Table A following 46 U. S. C. § 713).

Respectfully submitted,

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